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No. 95-8736

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LARRY OSA OGBOMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONSE OF *AMICUS CURIAE* TO THE SUGGESTION OF MOOTNESS

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RESPONSE OF *AMICUS CURIAE* TO THE SUGGESTION OF MOOTNESS

Pursuant to this Court's order of December 24, 1996, *amicus curiae* respectfully submits this response to the suggestion of mootness filed by the Acting Solicitor General.

INTRODUCTION

This case presents the question whether the district court possessed statutory authority under 18 U.S.C. § 3583(d) to require petitioner's deportation as a condition of supervised release. The term of supervised release to which petitioner was sentenced in this case was revoked by the district court on April 10, 1996. U.S. Br. 6; Suggestion of Mootness ("Suggestion") at 2; Order Revoking Supervised Release—Judgment and Commitment at 1 (N.D. Ga. Apr. 10, 1996). Meanwhile, in

August 1996, petitioner was sentenced by a different district court in a separate proceeding to 24 months' imprisonment, to be followed by five years' supervised release, with the condition that petitioner " 'shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 U.S.C. § 3583(d) and with *U.S. v. Chukwura.*' " U.S. Br. 7 n.5; *United States* v. *Ogbomon*, No. CR 96-PT-124-NE, Judgment in a Criminal Case ("Alabama Judgment") at 3 (N.D. Ala. Aug. 29, 1996).

ARGUMENT

"Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988); *see also Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) (mootness doctrine derives from Article III's "case or controversy" requirement). An actual controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994). As this Court has recognized, however, "Art. III justiciability is 'not a legal concept with a fixed content or susceptible of scientific verification.' " *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 400-401 (1980). Rather, " '[t]he justiciability doctrine [is] one of uncertain and shifting contours.' " *Id.* at 401.

This case amply illustrates the uncertainty referred to in *Geraghty*. On the one hand, in view of the district court's revocation of petitioner's term of supervised release and accompanying deportation condition, there is considerable merit to the suggestion that the case should be dismissed as moot. On the other hand, the district court's revocation order does not necessarily render this case moot in the constitutional sense. At the time the district court issued its revocation order, petitioner was likely to be (and now has been) subjected to the same

official action at issue in this case (namely, imposition of a judicial order of deportation pursuant to 18 U.S.C. § 3583(d)). Moreover, it is theoretically possible that a ruling on the merits in petitioner's favor could provide him with some meaningful relief. Accordingly, the Court may possess authority to decide this case on the merits. Even if the case is justiciable, however, prudential considerations militate in favor of dismissal.

I. The District Court's Revocation Of The Term Of Supervised Release And Accompanying Deportation Requirement Did Not Render The Case Non-Justiciable

A. Petitioner Was Reasonably Likely To Be Subjected To The Same Official Action Again

This Court has held that the discontinuance of challenged government action will not necessarily render a challenge to that action moot if there is a sufficiently substantial likelihood that the challenged action will be repeated. *See Washington* v. *Harper*, 494 U.S. 210, 219 (1990) (case not moot where "there is a strong likelihood" that the challenged governmental conduct might recur); *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980) (case not moot because "it is not 'absolutely clear . . . that the allegedly wrongful behavior could not reasonably be expected to recur' "); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.7 (2d ed. 1984 & Supp. 1996). Moreover, "[t]he burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles* v. *Davis*, 440 U.S. at 631.

After the district court revoked petitioner's term of supervised release in this case, there was a "strong likelihood" that petitioner would again be placed on supervised release and ordered deported pursuant to 18 U.S.C. § 3583(d). To be sure, this Court "generally [has] been unwilling to assume that the party seeking relief will

repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig* v. *Doe*, 484 U.S. 305, 320 (1988). At the time petitioner's term of supervised release was revoked, however, he had already been arrested pursuant to a criminal complaint filed in the United States District Court for the Northern District of Alabama charging him with bank fraud. U.S. Br. 6, 7 n.5. Accordingly, the likelihood that petitioner would again be sentenced to prison and a term of supervised release was far greater than would normally be the case.[1] And as an alien defendant subject to deportation, there was also a "strong likelihood" that, in keeping with what appears to be common practice in the district courts in the Eleventh Circuit, he again would be ordered deported as a condition of his supervised release.

Ultimately, the United States District Court for the Northern District of Alabama did order petitioner deported as a condition of supervised release pursuant to 18 U.S.C. § 3583(d). Alabama Judgment at 3. If a "strong likelihood" of a recurrence is sufficient to satisfy the justiciability requirements of Article III, *a fortiorari* an *actual* recurrence should suffice to preserve this Court's jurisdiction to decide the question presented. Accordingly, the fact that the term of supervised release and accompanying deportation condition imposed in this case have been revoked does not compel dismissal of the case as moot.

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[1] Indeed, petitioner ultimately pleaded guilty in the Northern District of Alabama to eight counts of bank fraud (18 U.S.C. § 1344(2)), two counts of a scheme to defraud (18 U.S.C. § 2314)), and one count of misusing a social security number (42 U.S.C. § 408(a)(7)(B)). Alabama Judgment at 1. In accordance with the applicable Sentencing Guidelines range, his term of imprisonment exceeded 12 months (*id.* at 2, 4), and a term of supervised release was therefore mandatory. U.S.S.G. § 5D1.1.

B. This Case May Be Capable Of Repetition Yet Evading Review

The Acting Solicitor General contends (Suggestion 5-10) that this case does not satisfy the mootness exception for cases that are "capable of repetition, yet evading review." *See, e.g., Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.8 (2d ed. 1984 & Supp. 1996). Even if correct, that contention would not undermine the justiciability of this case under the analysis discussed in Part I.A above. In any event, however, this case may also satisfy the "capable of repetition, yet evading review" exception.

1. "Capable Of Repetition"

For reasons already set forth above, the issue presented in this case is clearly "capable of repetition" with respect to petitioner; indeed, it already has reoccurred by virtue of petitioner's conviction and sentence in the Northern District of Alabama. The Acting Solicitor General asserts, however, that "[t]he legal issues raised by the Alabama judgment are not identical to the legal issues raised [by the Georgia judgment]" because, at the time the district court in Alabama entered judgment, petitioner was subject to an outstanding administrative deportation order. Suggestion at 6. The proffered distinction is unpersuasive.

The question presented in this case is precisely the same as that raised by the Alabama judgment, namely, whether 18 U.S.C. § 3583(d) authorizes federal district courts to require that alien defendants be deported. There is no merit to the suggestion that "[a]n order of judicial deportation under Section 3583(d) entered *after* a final administrative order of deportation raises different legal issues from those raised by the instant case." Suggestion at 6. Either Section 3583(d) authorizes judicial orders of deportation or it does not; neither petitioner

nor the Government has put forward an interpretation of Section 3583(d) that would authorize judicial orders of deportation only in circumstances where the defendant has already been subjected to an administrative order of deportation.[2] In any event, the language of Section 3583(d) cannot support such a construction.

There is no evidence that the Alabama district court relied in any way on the INS's determination that petitioner was a deportable alien. Indeed, irrespective of the administrative deportation order, it is indisputable that petitioner *is* an alien who is subject to deportation. Br. of *Amicus Curiae* 15 n.7. And in any event, a case may be "capable of repetition" even absent a showing that the legal issue likely will recur in precisely the same factual setting (*cf. Carroll* v. *Princess Anne*, 393 U.S. 175, 178-179 (1968)), or that precisely the same challenged action will recur (*see Burlington Northern R.R. Co.* v. *Surface Transp. Bd.*, 75 F.3d 685, 688-689 (D.C. Cir. 1996)).[3] Accordingly, this case clearly satisfies the "capable of repetition" requirement.

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[2] Indeed, the Government has disavowed any such interpretation, asserting instead that Section 3583(d) merely authorizes the district court "to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien who has been or will be ordered deported by the Attorney General under the INA, 'be surrendered to immigration officials for deportation proceedings under the [INA] . . . for the purpose of determining whether he is "an alien defendant . . . subject to deportation" ' and for such deportation." U.S. Br. 30 (citation omitted).

[3] *Murphy* v. *Hunt*, 455 U.S. 478 (1982) (*see* Suggestion at 6-7), is beside the point. In that case, the only constitutional claim raised by the criminal defendant was a challenge to the denial of pretrial bail; his subsequent conviction rendered that claim moot. The possibility that the defendant might later assert a separate claim for bail pending appeal was not sufficient to preserve the case from mootness because the constitutionality of denying bail to a person awaiting trial is obviously "a question distinct from the constitutionality of [denying bail] . . . to a person who has been tried and convicted." 455 U.S. at 481 n.5.

2. "Evading Review"

A more difficult question is presented by the "evading review" portion of this exception to the mootness doctrine. To be sure, petitioner's apparent failure to file a notice of appeal from his Alabama sentence (Suggestion at 7 n.3) will preclude further review (absent a motion to vacate sentence under 28 U.S.C. § 2255), but that omission obviously does not demonstrate that "the challenged action was in its duration too short to be fully litigated prior to its cessation." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

On the other hand, even if petitioner had filed a timely notice of appeal and sought to challenge the Alabama district court's order of deportation, it is far from clear that he would have been able to obtain review in this Court before being deported pursuant to the judgment in that case.[4] Judgment was entered in the Alabama action on August 29, 1996. Petitioner was sentenced to 24 months in prison, but because his sentence is concurrent with his earlier revocation sentence in the Georgia action (Alabama Judgment at 2), and accounting for credit for time served, he is likely to be released early in 1998. According to the Alabama judgment, petitioner "shall be deported immediately upon completion of the term of imprisonment." Alabama Judgment at 3. It follows, therefore, that petitioner likely will be deported considerably less than 24 months from the date judgment was entered in the Alabama action.

This Court has indicated that orders of less than two years' duration ordinarily evade review. *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 514-516 (1911); *see also Wisconsin Dep't of Industry* v. *Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (applying "capable of repeti-

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[4] By the same token, even if petitioner were to file a motion under 28 U.S.C. § 2255 seeking to challenge the deportation portion of his sentence in the Alabama case, it is unlikely that he could obtain full review prior to being deported.

tion, yet evading review" exception to permit review of three-year debarment that expired prior to decision). Thus, the relatively short duration of petitioner's imprisonment suggests that this case may well be one that satisfies the "evading review" prong of the "capable of repetition, yet evading review" doctrine. Indeed, more than 32 months have passed since petitioner initially was sentenced in this case, and this Court has not yet had an opportunity to decide the merits.

The Acting Solicitor General notes, however, that "[i]f a defendant (such as petitioner) anticipates that he will complete his term of imprisonment and then face deportation under a term of supervised release before completion of the entire appellate process (including any review by this Court), the defendant may seek to protect his ability to obtain relief by requesting a stay of the judicial deportation order." Suggestion at 7-8. Plainly, the possibility that petitioner might have been able to obtain a stay and thereby preserve his ability to receive full appellate review of the Alabama sentence militates against application of the "capable of repetition, yet evading review" exception in this case. That possibility is not necessarily fatal, however; the Court has at times deemed the exception applicable even in circumstances where it would seem that a stay, if sought and granted, could have preserved a live controversy pending appellate review. *See, e.g., Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976); *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-127 (1974).

Moreover, a strong likelihood that a challenged action will recur, standing alone, is sufficient to satisfy Article III's "controversy" requirement. *See, e.g., Harper*, 494 U.S. at 219 (focusing solely on likelihood of recurrence); *Vitek*, 445 U.S. at 487 (same); *County of Los Angeles* v. *Davis*, 440 U.S. at 631 (same); *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (same); *United States* v. *W. T. Grant Co.*,

345 U.S. 629, 633 (1953) (same). For purposes of Article III justiciability, therefore, the question whether the issue is likely to evade review in a future case does not appear to be dispositive. "[T]he 'yet evading review' portion of [this Court's] 'capable of repetition, yet evading review' test is prudential; whether or not that criterion is met, a justiciable controversy exists." *Honig* v. *Doe*, 484 U.S. at 341 (Scalia, J., dissenting). Accordingly, the district court's revocation of the sentence imposed in this proceeding does not render the case non-justiciable.

II. The Pendency Of The Administrative Order Of Deportation Against Petitioner Does Not Necessarily Render The Case Moot

The analysis set forth in Part I above suggests that, if the Alabama district court's judgment were the only deportation order pending against petitioner, this case would present a justiciable controversy despite the district court's revocation of the term of supervised release and deportation condition. Obviously, however, the matter is further complicated by the fact that petitioner is also subject to an administrative order of deportation that has apparently become final. U.S. Br. 6 n.4; Suggestion at 7 n.4.

It is well established that a case is moot if it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). The pending administrative deportation order may well deprive petitioner of any "'legally cognizable interest in the outcome'" (*United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980)), thereby rendering the case moot. On the other hand, there are at least two possible bases for concluding that the administrative order does not render the case non-justiciable.

First, as long as the Executive Branch continues to take the position that district courts lack authority to issue orders of deportation under 18 U.S.C. § 3583(d), the

potential mootness problem created by duplicative administrative orders of deportation is likely to occur in most, if not all, cases arising under Section 3583(d). That fact may suggest that a form of the "capable of repetition, yet evading review" doctrine should be applied to avoid depriving this Court of its ultimate authority to decide the meaning of Section 3583(d). *Cf. Honig* v. *Doe*, 484 U.S. at 335-36 (Scalia, J., dissenting) (noting that the Court has sometimes "dispens[ed] with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and other members of the public at large without ever reaching us") (emphasis eliminated); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 187 (1973); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972).

Second, there is a theoretical (albeit highly attenuated) possibility that petitioner could obtain some meaningful relief from a ruling in his favor in this case. If this Court were to hold that federal district courts lack jurisdiction to impose deportation as a condition of supervised release, it would follow that the Alabama district court lacked jurisdiction to impose that condition on petitioner. Accordingly, petitioner could move to correct his sentence pursuant to 28 U.S.C. § 2255.[5] The question to be decided

[5] Petitioner presumably would have to satisfy the "cause and prejudice" standard to sustain a collateral attack on his sentence. *See United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). It is well established that ineffective assistance of counsel constitutes "cause" for failing to raise an issue on direct review. *United States* v. *Breckenridge*, 93 F.3d 132, 134 n.1 (4th Cir. 1996). Thus, petitioner could prevail in a collateral challenge by showing that defense counsel in the Alabama action rendered ineffective assistance by failing to seek appellate review of the deportation order. Given the existing circuit conflict, the Solicitor General's confession of error on the Section 3583(d) issue, and the pendency of petitioner's petition for a writ of certiorari seeking this Court's review of that issue, it is at least conceivable that petitioner would be able to make this showing.

in this case—whether Section 3583(d) authorizes a federal district court to order an alien defendant deported as a condition of his supervised release—thus may "affect the rights" of petitioner. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam).

The possibility of "effectual relief" is not necessarily eliminated by the outstanding administrative deportation order. It appears that there could conceivably be independent consequences attributable to the supervised release order entered by the district court in the Alabama action. For example, the order provides that petitioner "shall be deported . . . and shall remain outside the United States during the [60-month] period of supervised release." Alabama Judgment at 3. In the unlikely eventuality that the Attorney General were to authorize petitioner to reenter the United States within five years after his release from prison, *see* 8 U.S.C. § 1182(a)(6)(B)(i), petitioner could not reenter the country without concomitantly violating the deportation condition of his supervised release and thereby subjecting himself to potential incarceration at the discretion of the district court. 18 U.S.C. § 3583(e)(3).[6]

In analogous circumstances, this Court has recognized that the mere possibility of collateral consequences arising from a criminal conviction or sentence will preserve a

[6] In particular, if petitioner (after his deportation) were to qualify as a "refugee" based on a well-founded fear of persecution, *see* 8 U.S.C. § 1101(42), the Attorney General might have discretion to authorize his reentry notwithstanding his earlier removal and criminal history, depending on whether any of petitioner's prior offenses constitutes an "aggravated felony." *See* 8 U.S.C. §§ 1101(a)(43)(M) (aggravated fraud felonies), 1157 (refugees), 1158 (asylum); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, §§ 321(a)(7) & 604, 110 Stat. 3009 (1996) (revising 8 U.S.C. §§ 1101(a)(43)(M) & 1158), *reproduced at* 138 Cong. Rec. H11808, H11825 (daily ed. Sept. 28, 1996). The Attorney General, however, has no authority to override a federal district court's supervised release order.

case from mootness despite the expiration or completion of the sentence. *See, e.g., Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) ("possibility" of collateral consequences suffices to avoid mootness); *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) ("The mere 'possibility' [of adverse collateral legal consequences] . . . is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.' "); *see also North Carolina* v. *Rice*, 404 U.S. at 248 (remanding for determination whether "there may be benefits to" modification of already-served sentence that would preserve case from mootness). Indeed, the Court has applied this principle to permit review of an expired sentence without requiring any showing of precisely what consequences, if any, could potentially result if the sentence went uncorrected. *Pollard* v. *United States*, 352 U.S. 354, 358 (1957) ("The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.").

To be sure, the foregoing cases involved situations in which the conviction or sentence actually under review could theoretically have collateral consequences; here, by contrast, the collateral consequences are attributable to a judgment entered in a different case. But the principle enunciated in those cases seems applicable here as well, because it demonstrates that petitioner may retain a judicially cognizable interest in challenging the order of deportation imposed by the Alabama district court. If that is so, this case arguably satisfies all of the requirements for justiciability; the revocation of the deportation requirement imposed by the court below does not moot the case because the same requirement was likely to be reimposed in a later case, and the imposition of the administrative order of deportation does not moot the case because the extant judicial deportation order may conceivably have collateral consequences.

III. Even Though This Case May Be Justiciable Under Article III, Prudential Considerations Militate In Favor Of Dismissal

Even if the foregoing analysis is correct, it is obvious that this case lies at or near the outer boundaries of Article III justiciability. Particularly in view of petitioner's apparent unwillingness to take readily available steps to preserve a live controversy (such as his refusal to comply with the law while on supervised release, his failure to file an appeal from the Alabama sentence, and his failure to seek administrative or judicial review of the administrative deportation order), it is difficult to justify the additional expenditure of this Court's resources that would be required to decide this case on the merits. Accordingly, it would be an appropriate exercise of discretion to dismiss the case, either on the ground that the case is moot or because the petition for a writ of certiorari would not have been granted had the Court been informed in a timely manner of the revocation of petitioner's supervised release. *Cf. Tiverton Bd. of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*) (reaffirming the " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation").[7]

As previously noted, moreover (*see* Br. of *Amicus Curiae* at 19 n.9), a recently enacted revision of the INA's deportation procedures raises a question about the ongoing significance of the question presented in this case. That provision states that "[u]nless otherwise specified in this Act [the INA], a proceeding under this section [new INA Section 240] shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted,

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[7] Of course, petitioner is not the only person who would be affected by this Court's resolution of the question presented in this case, so there are countervailing reasons for proceeding to address the merits if the case is justiciable.

removed from the United States." IIRAIRA, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (1996), *reproduced* at 138 Cong. Rec. H11798 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1230(a)(3) (effective April 1, 1997).

The Acting Solicitor General now takes the position that this provision "overrides the holding of the court of appeals in this case" as to cases arising after April 1, 1997. Suggestion at 9.[8] It remains to be seen, however, whether the Eleventh Circuit will agree with that interpretation; the principle that implied repeals are disfavored certainly suggests that Section 3583(d) will continue to authorize judicial deportation even after IRRAIRA's effective date. *See* Br. of *Amicus Curiae* at 19 n.9.

On its face, moreover, IIRAIRA § 304(a)(3) mandates exclusivity only as to the procedures for removal of aliens who have been "so admitted," *i.e.*, admitted under

[8] The Acting Solicitor General also contends that the enactment of this provision renders inapplicable the mootness exception for controversies that are "capable of repetition, yet evading review." Suggestion at 8-10. But the relevant question for purposes of this mootness exception (at least as it applies to the revocation of supervised release in this case) is whether the controversy between *petitioner* and the United States is "capable of repetition, yet evading review," not whether similar controversies involving *other* defendants are likely to arise with frequency in the future. *Weinstein* v. *Bradford*, 423 U.S. at 149. When petitioner's supervised release and accompanying deportation condition were revoked in this case, and at all times thereafter, there was a reasonable probability that he would again be subjected to the same judicial order; that fact suffices to demonstrate that the controversy is "capable of repetition." "[H]owever much the new [law] may reduce the practical importance of this case, it does not completely remove the controversy." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203. And in any event, the frequency with which this issue arises in the Eleventh Circuit suggests that it is likely to arise again with respect to other defendants in the future, at least until April 1, 1997 (and quite possibly thereafter as well).

IIRAIRA's amended admissions provision; at least arguably, therefore, Section 304(a)(3) does not affect other statutes to the extent they authorize deportation of aliens who were not admitted under IIRAIRA. But for present purposes, the possibility that the Eleventh Circuit may adopt the Government's reading of this provision and thereby eliminate the present circuit conflict tends to reduce still further the justification for additional expenditure of this Court's resources on this case.[9]

IV. If The Case Is Determined To Be Moot, The Order Granting Certiorari Should Be Vacated And The Petition For Certiorari Should Be Dismissed Without Vacatur Of The Judgment Below

When a criminal case is rendered moot by the death of the defendant, this Court will vacate the order granting certiorari (if appropriate) and dismiss the petition for certiorari. *United States* v. *Green*, 507 U.S. 545 (1993); *Dove* v. *United States*, 423 U.S. 325 (1976); *see also Mintzes* v. *Buchanon*, 471 U.S. 154 (1985). By analogy, the same approach would appear to be appropriate in this case if the Court concludes that the case is moot.

In civil cases that become moot as a result of happenstance while awaiting appellate review, this Court has held that the judgment of the lower court should be vacated and the case dismissed. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That approach does not appear to have been extended to the criminal context, however, and there is no reason to do so in this case. Indeed, even if vacatur might be an appropriate response to mootness in some criminal cases, it would be particularly inappropriate here.

[9] As the Acting Solicitor General observes (Suggestion at 10), that possibility also militates against granting one of the other pending petitions that presents this same issue.

In the civil context, this Court has traditionally "disposed of moot cases in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot." *Bonner Mall*, 115 S. Ct. at 391 (internal quotation marks omitted). The "principal condition" relied upon by the Court has been "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Ibid.* Thus, when a petitioner moots the case by entering into a settlement agreement, he "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392.

Any mootness resulting from the revocation of petitioner's term of supervised release is directly attributable to petitioner's voluntary misconduct in committing additional federal crimes while on supervised release. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." 115 S. Ct. at 392. If a voluntary settlement agreement between petitioner and respondent "constitutes a failure of equity that makes the burden decisive" (*ibid.*), *a fortiori* petitioner's voluntary commission of additional crimes precludes him from meeting his heavy burden in this case.

CONCLUSION

While the revocation of petitioner's supervised release in this case clearly raises an issue of mootness, the underlying controversy may not be constitutionally moot. A ruling in petitioner's favor could result in invalidation of the judicial deportation requirement to which he is currently subject, thereby enhancing the theoretical possibility that petitioner might at some point be able legally to reenter the United States. On balance, however, this speculative chain of possibilities is sufficiently attenuated, and the need for this Court's review is sufficiently slight, that the better course would be to vacate the order granting certiorari and dismiss the petition as moot or, in the alternative, to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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